UNITED STATES OF AMERICA	)	
	)	**RULING: Government Motion:**
v.	)	**MRE 404(b) Evidence**
	)	**Admissibility**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**30 August 2012**
Fort Myer, Virginia 22211	)	

The Government moves to make a preliminary determination on the admissibility of three instances of crimes, wrongs, or acts, under MRE 404(b) and on the use of such evidence to rebut the offer of a pertinent character trait under MRE 404(a). Defense opposes.

Findings of Fact:

MRE 404(b) act 1: June 2008 internet posting by the accused and corrective training.

1. The Government proffers that on 28 June 2012, (b) (6) B.M. , the accused's AIT platoon sergeant, observed postings by the accused on YouTube using "buzzwords" such as top secret, secret, classified and SCIF, against his training. As corrective training (b) (6) B.M. required the accused to give a presentation to the platoon at formation, present a PowerPoint presentation to (b) (6) B.M. and prepare a written product. The accused's presentation to the platoon discussed information security, proper handling of information, a Soldier's obligation to protect and not expose classified material, the possibility that a Soldier's disclosure that he or she has access to classified material may be dangerous to the Soldier, and that enemy forces are trying to collect information on the U.S. Military. The accused's written product and PowerPoint presentation defined secret information and identified the type of people who try to collect information for use against the United States, such as foreign governments, enemies, spies, hackers, etc.

2. The Government will offer this evidence through the testimony of (b) (6) B.M. and a slide show found on the accused's external hard drive. The evidence is offered to prove the accused's knowledge to commit the charged offenses, specifically that the training the accused presented to the platoon shows that the accused knew that information posted on the internet is accessible to and sought out by the enemy.

3. The uncharged misconduct occurred on or about June 2008. The accused deployed in October 2009. The date of inception of the charged misconduct is 1 November 2009. The Government proffers that the charged and uncharged misconduct are temporally proximate, 18 months apart, therefore, the probative value outweighs any danger of unfair prejudice under MRE 403.

4. The Defense stipulates to the facts as proffered by the government and that an adequate foundation has been laid by the Government to support a finding by the fact finder that the accused committed the prior acts. Defense argues that the evidence of the YouTube posting and the corrective training does not make a fact of consequence more or less probable and that the probative value of the evidence is outweighed by the danger of unfair prejudice under MRE 403.

MRE 404(b) act 2: statement made by the accused to (b) (6) J.S. between March and October 2009.

1. The Government proffers that (b) (6) J.S. supervised the accused from March 2009 and that (b) (6) J.S. counseled him on his military bearing shortly before they deployed in October 2009. During the counseling and in response to a question from (b) (6) J.S. about what the flag meant to the accused, the accused responded that the flag meant absolutely nothing to him and he had no allegiance to the United States or to its people.

2. The Government offers the transcript of (b) (6) J.S. under oath testimony at the Article 32 investigation and a sworn statement given by (b) (6) J.S. to prove that she would testify similarly to support a finding by the fact-finder that the accused committed the uncharged conduct.

3. (b) (6) J.S. arrived at the accused's unit and began supervising him in March 2009. The statements were allegedly made after the accused and (b) (6) J.S. went to JRTC within months prior to the October 2009 deployment. There is no further specificity in the evidence before the Court. The inception date of the charged misconduct is 1 November 2009.

4. The Government offers the accused's statements to prove his state of mind. The fact that he had no loyalty to the United States is evidence of the accused's intent to commit the charged misconduct because he did not care if the enemy had access to the information that was posted on the internet. It is offered as circumstantial evidence relevant to prove the accused knowingly gave intelligence to the enemy for the Specification of Charge I, recklessly and wantonly caused information to be published on the internet for Specification 1 of Charge II with knowledge that the information would be accessible to the enemy, that the accused acted willfully for Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II, and that the accused stole, purloined or knowingly converted a thing of value from the United States for Specifications 4, 6, 8, 12, and 16 of Charge II.

5. The Defense posits that the government has presented no evidence the accused acted with animus toward the United States. The Defense further argues that (b) (6) J.S. statement is unreliable because she did not report the accused's statement until after the accused assaulted her in May 2010 and when the charges against the accused were known. Additionally, the circumstances surrounding the making of the statement formal counseling with requirement for the accused to attend and the fact that (b) (6) J.S. did not know why the accused made the statements further make the probative value of the statement low. Finally, the Defense argues that lack of temporal proximity between the accused's statements to (b) (6) J.S. and the charged offenses and the circumstances surrounding the making of the statements render the probative value outweighed by the danger of unfair prejudice under MRE 403.

6. The Defense argues the Court should reject (b) (6) J.S. prior statements and require her live testimony. The Defense did not request that the Government produce her for the motion. The Court considered the CD audiotape of (b) (6) J.S. article 32 testimony proffered by the Defense.

MRE 404(b) act 3: May 2010 assault of (b) (6) J.S. resulting in an Article 15 for the accused and causing his removal from the 2-10 Mountain SCIF.

1. The accused received an article 15 for the May 2010 incident. (b) (6) J.S. and other witnesses testified about the incident during the Article 32. The Government proffers the uncharged misconduct is relevant to show the timeline of the accused's removal from the SCIF to the supply room and the mental state of the accused at the time. The timeline is relevant to prove the accused stole or converted the U.S. Forces-Iraq Global Address List charged in Specification 16 of Charge II. The Government further argues that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403 because there will be little distraction for the fact finder because the incident was a one-time event that will take little time to prove.

2. The Defense challenges the 2nd and 3rd prong of the MRE 404(b) test for admissibility because establishing the Government's timeline is not an appropriate purpose for MRE 404(b). The Defense further posits that any probative value of the evidence is outweighed by the danger of presenting uncharged misconduct to the fact-finder when the timeline can be established by eliciting testimony from (b) (6) B that the accused was assigned to work for him in the supply room.

The Law:

MRE 404(b) allows evidence of uncharged misconduct when it is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the fact-finder infer that he is guilty as charged because he is predisposed to commit similar offenses. It is unnecessary that relevant evidence fit snugly into a pigeon hole provided by MRE 404(b). *U.S. v. Castillo*, 29 M.J. 145 (C.M.A. 1989). In determining whether the proponent has introduced sufficient evidence to meet MRE 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.

To be admissible under the evidence rules, evidence of the uncharged misconduct must satisfy a three-part test:

(1) The evidence must reasonably support a finding by the fact finder that the accused committed the uncharged crime, wrong, or act;

(2) The evidence must make some fact of consequence more or less probable, although it cannot be offered only as impermissible character evidence; and

(3) The probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *U.S. v. Reynolds,* 29 M.J. 105, 109 (C.M.A. 1989). Factors that have been considered include the strength of proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence, distraction of the fact finder; time needed to prove the prior conduct; temporal proximity of the prior event; frequency of the acts, the presence of intervening parties and the relationship between the parties. *U.S. v. Berry,* 61 M.J. 91 (C.A.A.F. 2005).

To be relevant and admissible, the evidence must directly relate to some specific fact that is of consequence to the action, not to the general issue of criminality. It must be connected in time, place, and circumstance with the charged offense.

Conclusions of Law - MRE 404(b) act 1: June 2008 internet posting by the accused and corrective training.

1. The testimony of (b) (6) B.M. at the article 32 investigation and the slide show at enclosure 2 of the Government's motion provides sufficient evidence to support a finding by the fact finder that the accused posted the video on YouTube and drafted and presented the slide show to his platoon as corrective training.

2. The following are consequences in issue for the government to prove in the Charged Offenses: that the accused knowingly gave intelligence to the enemy for the Specification of Charge I, that the accused recklessly and wantonly caused information to be published on the internet for Specification 1 of Charge II with knowledge that the information would be accessible to the enemy, that the accused acted willfully for Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II. The fact that the accused received a reprimand for and was told to remove a video he placed on the internet using words such as "classified information" and "SCIF" and that he prepared a power point presentation entitled "Operations Security, (OPSEC)" is relevant to prove that the accused had the above listed *mens rea* for those charges. This uncharged conduct does not prove any consequence at issue regarding whether the accused stole, purloined or knowingly converted a thing of value from the United States for Specifications 4, 6, 8, 12, and 16 of Charge II.

3. The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. Although the uncharged conduct occurred approximately 17 months prior to the inception date of the charged misconduct, receiving a reprimand by a platoon sergeant for improperly posting a YouTube video referencing classified information terms and the preparation and presentation of an operations security class would be significant events for an AIT student. Both the removal of the improperly posted video and the powerpoint presentation are probative of the accused's knowledge of information security and his intent to disregard that knowledge. The evidence of the uncharged conduct will take little time and will not be distracting for the fact finder. There is no potential to present less prejudicial evidence. The Court will give a limiting instruction on the proper use of this evidence to mitigate any risk of unfair prejudice.

4. The posting of the video, the removal of the video, the reprimand by (b) (6) B.M., and the corrective training class are admissible under MRE 404(b) for the reasons set forth in paragraph 2.

Conclusions of Law - MRE 404(b) act 2: March 2009 statement made by the accused to (b) (6) J.S..

1. The transcript and audio taped testimony of (b) (6) J.S. Article 32 and her sworn statement to CID are consistent and provide sufficient evidence to reasonably support a finding by the fact finder that the accused made the uncharged statements. The Defense has not presented any evidence that (b) (6) J.S. would testify any differently at trial.

2. The accused's statements were made between March and October 2009 after the accused went to JRTC. Thus, they were made between 6 and 2 months prior to the inception date of the charged misconduct. The accused's statements prior to his deployment are relevant to his state of mind during the deployment. The uncharged statements are admissions by the accused that are probative to a fact at issue. Evidence that the accused had no loyalty to the flag or to the United States or its people is evidence to prove that the accused did not care if the enemy had access to the information. This state of mind is relevant to prove that the accused knowingly gave intelligence to the enemy for the Specification of Charge I, that the accused recklessly and wantonly caused information to be published on the internet for Specification 1 of Charge II with knowledge that the information would be accessible to the enemy, that the accused acted willfully for Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15 of Charge II. These uncharged statements do not prove any consequence at issue regarding whether the accused stole, purloined,or knowingly converted a thing of value from the United States for Specifications 4, 6, 8, 12, and 16 of Charge II.

3. The probative value of the uncharged statements is high to prove the accused's knowledge and intent. The evidence will not take long to present and will not confuse or distract the fact finder. There is no potential to present less prejudicial evidence. Evidence of the accused's statements are prejudicial to the accused as is all inculpatory information. The issue is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The risk of unfair prejudice is that the fact finder will use the evidence for something other than the limited purpose for which it is introduced or to that they will convict the accused because they think he is a bad person because of the uncharged statements. The Court will instruct the members fully on the limited use of this evidence.

4. Evidence of the accused's statements to (b) (6) J.S. are admissible under MRE 404(b) to prove knowledge and *mens rea* as set forth in paragraph 2 of this section.

Findings of Fact and Conclusions of Law –MRE 404(b) act 3: May 2010 assault (b) (6) J.S. causing the removal of the accused from the 2-10 Mountain SCIF.

1. The Article 15 package, the statements of (b) (6) B and (b) (6) J.S. and the under oath Article 32 testimony of (b) (6) J.S. provide sufficient evidence to reasonably support a finding by the fact finder that the accused assaulted (b) (6) J.S..

2. The evidence is relevant to present to the fact finder the reasons why the accused was removed from the SCIF to the supply room and had his clearance suspended and his access to classified information removed.

3. The probative value of the evidence is substantially outweighed by the risk of unfair prejudice under M E 403 if presented during the Government's case in chief. There is the potential to present less prejudicial evidence to prove that the accused was removed from the SCIF to the supply room on or about 8 May 2010, that his security clearance was temporarily revoked, and that he did not have access to classified information while in the supply room. The Government can elicit testimony from (b) (6) B that the accused was moved from the SCIF to the supply room and that he was not cleared for nor did he have access to classified information while he was working in the supply room.

4. Evidence that the accused assaulted (b) (6) J.S. or received an article 15 for the uncharged conduct is not admissible in the Government's case in chief.

MRE 404(b) Acts to Rebut Good Soldier Defense. The Government may use specific instances of conduct to cross examine witnesses presenting good Soldier character evidence on behalf of an accused with "have you heard" "did you know" "were you aware" questions so long as the Government has a good faith basis to inquire. Each of the three acts of uncharged misconduct provides that good faith basis.

RULING: The Government motion to admit evidence of M E 404(b) acts 1 and 2 is **GRANTED.** The Government motion to admit evidence of M E 404(b) act 3 is **DENIED**.

So **Ordered** this 30th day of August 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit